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in the Supreme Court of the United States

No. [redacted] 209

RONALD E. KAY,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

JOSEPH GASSEN,
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Honorable M. Daniel Futch, Jr.,
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MIAMI REVIEW — 371-4853 — 377-3721

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in the
Supreme Court
of the
United States

No. _____

RONALD E. KAY,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

---

Petitioner, Ronald E. Kay, a member of the Bar of The State of Florida, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered in the above case on February 11, 1970.

OPINION BELOW

The opinion of the court below (Appendix A) is reported at 232 So.2d 378.

JURISDICTION

The Judgment of the Supreme Court of Florida was filed on February 11, 1970. (Appendix A) A timely Petition for Rehearing filed on February 23, 1970, and was denied on March 30, 1970. (Appendix B) A timely Motion to Stay filed on February 23, 1970 was granted on March 30, 1970 and proceedings in the Supreme Court of Florida were stayed to and including May 29, 1970. (Appendix C) The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1.

Whether the disbarment of an attorney, predicated upon a single, isolated act of homosexuality, entirely unrelated to the practice of law, is a denial of due process of law.

2.

Whether Rule 11.02(3)(a) of Article XI of the Integration Rule of the Florida Bar is void for vagueness and is impermissibly overbroad in violation of due process of law and unconstitutionally invades the right of privacy.

3.

Whether disbarment of an attorney, predicated upon a single, isolated act of homosexuality, entirely unrelated to the practice of law, is too severe a penalty.

DISCIPLINARY RULE INVOLVED

The disciplinary rule involved is Rule 11.02(3)(a) of Article XI of the Integration Rule of the Florida Bar. (Appendix D)"

STATEMENT

On December 1, 1966, Officer Gerald Wilson of the Fort Lauderdale, Florida, Police Department, went to Stranahan Park, in Fort Lauderdale, Florida, and gained entry to a locked supply room, which led to an area between the ladies' room and the men's room. From this concealed vantage point, Officer Wilson could peer through a ventilator which was located in the men's room, and there, in the secrecy of his hideaway, could and did observe the activities in the men's rest room.

Officer Wilson testified that John Mathew McGrath was seated on the commode which is located in the men's rest room. Testimony reflects that there are two commodes in this men's rest room, separated by a solid partition with no doors on the commode stalls. Mr. McGrath was seated on the commode closest to the west wall of the building where a window was located. It was Officer Wilson's testimony that he could look over the partition between the two commodes and could see the activities in the west commode area. It was his testimony that he saw the petitioner, Ronald E. Kay, come to the rest room, urinate at the urinals, which were located on the east wall, and that after other persons in the rest room had left, he went to McGrath, and, with only he and McGrath in the room, that he saw an act of homosexuality between Kay and McGrath. He further testified that the peti-

tioner was watching out the window. (By looking out the window any person approaching the door of the men's room could be observed.) During this time no other person came into the rest room. (Officer Wilson, upon observing this, came out of hiding, came around to the men's room and arrested both McGrath and the petitioner.)

The petitioner denied the act.

The petitioner was convicted on May 4, 1967 in the Municipal Court of the City of Fort Lauderdale, Florida, of indecent exposure in violation of the Code of Ordinances of the City of Fort Lauderdale, Florida. The matter was also in court on two other subsequent occasions. The additional proceedings were necessitated by reason of a lie detector test which the petitioner had taken, which proved him to be innocent of the charge. The lie detector test was not used in evidence, although it was discussed quite extensively. The court expressly stated that it had to disregard the lie detector test because the prosecution would not stipulate to its admission.

A motion for a new trial was filed by the petitioner, and the motion was denied. Petitioner appealed to the Circuit Court, which affirmed the Municipal Court. A further appeal was taken to the Fourth District Court of Appeal. On November 4, 1968, the District Court affirmed the Circuit Court. **Ronald E. Kay v. City of Fort Lauderdale,** 215 So.2d 49. (4th D.C.A. Fla.)

These proceedings were commenced by the filing of a complaint against the petitioner, Ronald E. Kay, a member of the Florida Bar. The Grievance Committee found probable cause for referral to the Board of Governors of

the Florida Bar. Thereafter, Bar counsel and a Referee were appointed. It was stipulated that the Municipal Court record would be the testimony at the hearing before the Referee. The Referee recommended permanent disbarment, and the Board of Governors modified the recommendation to disbarment. At the proceeding before the Referee, and in the petitioner's statement in opposition to the findings and recommendations of the Referee, the petitioner raised the federal questions of deprivation of his right to practice law without due process of law and that the punishment was much too severe. In petitioner's petition for review (appeal) in the Florida Supreme Court, and in his brief in the Florida Supreme Court, he also raised the federal questions of the deprivation of his right to practice law without due process of law, and the severity of the penalty imposed.

The Supreme Court of Florida affirmed the Board of Governors of the Florida Bar in a judgment filed on February 11, 1970. A timely petition for rehearing was filed by petitioner on February 23, 1970, and was denied on March 30, 1970. A timely motion to stay was filed on February 23, 1970, and it was granted on March 30, 1970. Pursuant to the order of March 30, 1970, proceedings in the Supreme Court of Florida were stayed to and including May 29, 1970.

REASONS FOR GRANTING THE WRIT

1. The Florida Supreme Court's decision below denies the petitioner, Ronald E. Kay, of his right to practice law, without due process of law and is in direct conflict with the decisions of this court.

Mr. Justice Black's dissenting opinion in **Cohen v. Hurley,** 366 U.S. 117, 131-150, 81 S.Ct. 954, 963, 972, 6 L.Ed. 2d 156, 166-177 (1961), subsequently adopted by the majority in **Spevack v. Klein,** 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) states quite emphatically that the practice of law is a means of earning a livelihood which has not been conferred upon an attorney as a gift from the state; neither can the state destroy the right to practice law whenever it can assert a 'reasonable' justification for doing so. "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment." **Schware v. Board of Bar Examiners,** 353 U.S. 232, 238, 239, 77 S.Ct. 752, 755-756, 1 L.Ed.2d 796, 801-802 (1957). "Regardless of how the state's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the state's grace. **Ex Parte Garland,** 4 Wall. 333, 379, 18 L.Ed. 366." **Schware v. Board of Bar Examiners,** supra, fn. 5, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, 801.

The "valid reason" that will justify disbarment exists only when an attorney's actions are such that he has demonstrated an unfitness to practice law or that his actions adversely affect the proper administration of justice. **In re Garsuch,** 75 N.W.2d 644, 648 (1956). Any disbarment for an act unrelated to the practice of Law is arbitrary and capricious, and a violation of due process of Law. Many years ago, it was recognized that the Court is not a censor of morals, and it is not required to pronounce upon the style of manner and conversation which becomes an honorable member of the legal profession. **People v. Palmer,** 61 Ill. 255. (1871)

The Court has no regulatory power over the private life of members of the Bar, and it cannot exclude them from practice for private acts unless they are such as to clearly demonstrate their unfitness to practice. **Bartos v. United States District Court**, 19 F.2d 722, 724 (8th Cir. 1927). See also **In re Rothrock**, 16 Cal.2d 449, 455, 109 P.2d 907, 910, 131 A.L.R. 226 (1940); **In re Dampier**, 46 Idaho 195, 267 P. 452 (1928); **People ex rel. Black v. Smith**, 290 Ill. 241, 124 N.E. 807, 808, 9 A.L.R. 183 (1919). **Re: Washington**, 82 Kan. 829, 109 P. 700 (1911); **State v. McClaugherty**, 33 W.Va. 250, 10 S.E. 407, 410 (1889).

Accordingly, it has been held that the fact that an attorney frequented a disorderly house was not grounds for disbarment, **People ex rel. Black v. Smith**, supra; nor was an attorney's seduction of his stenographer grounds to warrant disbarment, **State v. Byrkett**, 4 Ohio S. & C.P. Dec. 89 (1895); **In re H T**, 2 Pennyp. (Pa.) 84 (1882), the Court said in dictum that fornication was not an offense justifying disbarment.

Even in occupations which one does not have the right to engage in, there must be a rational connection between the acts complained of and the effect upon the service rendered. Thus, in **Norton v. Macy**, 417 F.2d 1161, 1165, (D.C. Cir. 1969), the Circuit Court of Appeals for the District of Columbia ordered reinstated a NASA employee who had been dismissed because he had committed homosexual acts. There was simply no showing that the homosexual acts had any deleterious effects upon the employee's performance of his duties. Therefore, the dismissal was arbitrary and capricious and a violation of due process.

The Bar's constitutional limits on its power to dismiss its members may be greater where, as here, the dismissal imposes a badge of infamy. (**Wieman v. Updegraff,** 344 U.S. 183; at 191, 73 S.Ct. 215, 97 L.Ed. 216 (1952). The Due Process Clause may also cut deeper into the Government's discretion where a dismissal involves an intrusion into the ill-defined area of privacy, **Norton v. Macy,** supra, at p. 1164. In **Morrison v. State Board of Education,** 87 Cal. Rptr. 175, 461 P.2d 375 (1969) the California Supreme Court reversed the California Board of Education, which had dismissed a teacher because of his homosexual acts. Again, the Court pointed out that there was simply no connection with the homosexual acts and the teacher's discharging his duties.

In the present case, the Florida Supreme Court **admits** that there is no connection between petitioner's act and the practice of law. Chief Justice Ervin, concurring, states at p. 380:

> "The present record contains no evidence—scientific, medical, pathological or otherwise—suggesting homosexual behavior among consenting adults is so indicative of other character baseness as to warrant a condemnation per se of a participant's ability ever to live up to and perform other societal duties, including professional duties and responsibilities assigned to members of the Bar. Consequently, the present case leaves this issue unresolved by appropriate findings based on competent evidence."

2. Civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide

against which conduct can be uniformly judged by courts and administrative agencies. **Morrison v. State Board of Education,** supra.

It would be difficult to find a statute, or administrative regulation which is as unclear, or which grants the regulatory body (in this instance, the Bar) greater latitude and fewer standards, in regulating every facet of the private lives of those subject to it, than Rule 11.02(3)(a) of Article XI of the Integration Rule of The Florida Bar. (Appendix D). What is an "act contrary to . . . good morals?" The Rule gives no indication whatsoever of the conduct that is prohibited. The Florida Bar has neither the expertise nor the requisite annointment to make or enforce absolute moral judgments. **Norton v. Macy**, supra, pg. 1165. Its standard of what constitutes an "act contrary to . . . good morals" is no more than the prevailing mores of our society, **Norton v. Macy,** supra, pg. 1165. Indeed, an act that is considered "contrary to . . . good morals" in one part of the State might very easily be perfectly acceptable in another part of the State. Is an attorney's right to practice law dependant upon where he lives?

Given the latitude which Rule 11.02(3)(a) of Article XI of the Integration Rule of the Florida Bar, acts "contrary to . . . good morals" cover a multitude of sins. Indeed, it may be doubted whether there are in the entire Florida Bar many persons so saintly as never to have done any act which is disapproved by the prevailing mores of our society. **Norton v. Macy,** supra, p. 1165. This is especially true when the fact that the most widely accepted study of American sexual practices, The Kinsey Report,

estimates that at least thirty-seven per cent of the American male population have had at least one homosexual experience during their lifetime is taken into account. **Norton v. Macy**, supra, p. 1167, f.n. 28. The notion that it would be an appropriate function of the Florida Bar to enforce the majority's conventional codes of conduct in the private lives of its members is at war with elementary concepts of liberty, privacy and diversity. **Norton v. Macy**, supra, p. 1165. "If there is any fixed star in our constitutional constellation, it is that no official, high or petit, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein." **Schware v. Board of Bar Examiners**, supra, 353 U.S. 232, 244-245, fn. 15, 77 S.Ct. 752, 1 L.Ed.2d 796, quoting **West Virginia State Board v. Barnette**, 319 U.W. 624, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943).

By its obvious overbroadness, Rule 11.02(3)(a) of Article XI of the Integration Rule of the Florida Bar enables the Bar unconstitutionally to interfere with an attorney's right to privacy. What an attorney does with his private life, as long as it does not affect the Bench, the Bar, his clients or the public, is no one's business but his. Neither the state, nor the Bar has any right to inquire into his private life. **Griswold v. Connecticut**, 381 U.S. 479, 14 L.Ed.2d 510 (1965). **Stanley v. Georgia**, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, (1969).

Should it be contended that petitioner's act was not a private one **Britt v. Superior Court**, 374 P.2d 817 (1962) provides the answer. In **Britt**, the California Supreme Court stated:

> "Man's constitutionally protected right of personal privacy not only abides with him while he is in the household or while in his own castle but cloaks him when as a member of the public he is temporarily occupying a room—including a toilet stall to the extent that it is offered to the public for private, however transient, use."

Recently, this court stated in **Katz v. U. S.**, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), that the Fourth Amendment protects people, not places. What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

3. The purpose of disciplinary proceedings is to protect the public against unprofessional, improper and unauthorized practice of law and unprofessional conduct of members of the Bar. **In re Dampier,** supra, p. 453. And, even the Florida Bar recognizes that: " . . . disbarment is the most extreme penalty which can be imposed upon an errant member of the legal profession." Furthermore, punishment should not be a penalty of retribution. **The Florida Bar v. Ruskin,** 126 So.2d 142 (1961). In numerous cases, in which an attorney has been found guilty of most egregious conduct, directly related to the practice of law, the Bar has recommended lighter penalties than disbarment, or no penalty at all. See **The Florida Bar v. Silverman,** 196 So.2d 442 (1967); **State v. Brown,** 111 So.2d 688 (1959); **The Florida Bar v. King,** 174 So.2d 398 (1965).

Moreover, if the Bar feels that petitioner's acts are of such a heinous nature, it should institute penal proceedings against petitioner. The only way in which the Bar can seek to achieve a legitimate punitive purpose is

through a penal prosecution. **Yakov v. Board of Medical Examiners**, 68 Cal.2d 67, 64 Cal.Rptr. 784. 435 P.2d 553, (1968). And, this has already been done in the Municipal Court of Fort Lauderdale, Florida. Accordingly, under the decision handed down several weeks ago by this Court, **Waller v. Florida**, 38 U.S.L.W. 4263, The State of Florida, in all its instrumentalities, including The Florida Bar, is barred from any other punitive action against the Petitioner.

CONCLUSION

Accordingly, we respectfully submit that the decision and opinion of the Supreme Court of Florida through which the Petitioner, Ronald E. Kay, was ordered disbarred be reversed and set aside.

Respectfully submitted,

JOSEPH GASSEN,
Attorney for the Petitioner,
Ronald E. Kay

Of Counsel for Petitioner, Ronald E. Kay
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Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a copy (counterpart) of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Florida in these proceedings to

Honorable Earl Faircloth
Attention Honorable George R. Georgieff
Assistant Attorney General
The Capitol Building
Tallahassee, Florida

Honorable M. Daniel Futch, Jr.
Florida Bar Counsel
Broward County Courthouse
Fort Lauderdale, Florida

Honorable Marshall R. Cassedy
Executive Director of The Florida Bar
Office of the Executive Director
Supreme Court Bldg.
Tallahassee, Florida 32304

Honorable Richard C. McFarlain
Assistant Staff Counsel
Office of the Executive Director
Supreme Court Bldg.
Tallahassee, Florida 32304

on this the 26 day of May, 1970.

Joseph Gassen

JOSEPH GASSEN,
Attorney for the Petitioner,
Ronald E. Kay
619 Dade Federal Building
101 East Flagler Street
Miami, Florida 33131

APPENDIX A

THE FLORIDA BAR, Complainant,

v.

Ronald E. KAY, Respondent.

No. 38694.

Supreme Court of Florida.

Feb. 11, 1970.

Rehearing Denied March 30, 1970.

Proceeding by the Florida Bar against an attorney. The Supreme Court held that an attorney who is convicted of indecent exposure in violation of city ordinance and who exhibits a lack of candor in his testimony at the criminal and disciplinary hearings, will be disbarred and ordered to pay the cost of the proceeding.

Order in accordance with opinion

Attorney and Client Key 58

An attorney who is convicted of indecent exposure in violation of city ordinance and who exhibits a lack of candor in his testimony at the criminal and disciplinary hearings, will be disbarred and ordered to pay the cost of the proceeding. 32 F.S.A. Integration Rules of The Florida Bar, art. 11, rule 11.02(3).

M. Daniel Futch, Jr., Fort Lauderdale, for The Florida Bar, complainant.

Louis M. Jepeway, Jr., of Jepeway, Gassen & Jepeway, Miami, for respondent.

PER CURIAM.

We have received the following judgment of the Board of Governors of The Florida Bar which is predicated upon a violation of Integration Rule, Art. XI, Rule 11.02(3), 32 F.S.A.:

"JUDGMENT

"This cause came on for review and consideration by the Board of Governors of The Florida Bar upon the report of the referee and the record of proceedings before him.

"The referee found that on December 1, 1966, respondent was a party to a homosexual act with a consenting adult male in the public lavatory of Stranahan Park, Fort Lauderdale, Florida. This activity was observed by a police officer. As a result of this observation, respondent was charged with indecent exposure in the Fort Lauderdale Municipal Court, said charge being a violation of the Code of Ordinances of the city. A finding of guilty was subsequently entered. An appeal was taken by respondent to the Circuit Court which affirmed the municipal court. A further appeal was taken to the Fourth District Court of Appeal. On November 4, 1968, the Fourth District Court of Appeal affirmed the circuit court. Kay v. City of Fort Lauderdale, 215 So.2d 49 (4th D.C.A.Fla.1968).

"In addition to respondent's homosexual activity, the referee found a lack of candor and serious conflicts in respondent's testimony at the criminal and disciplinary hearings.

"It was the opinion of the referee that respondent's conduct was blatantly contrary to good morals and a proper subject for disciplinary action. The referee recommended that respondent be found guilty of misconduct justifying disciplinary measures and that he be permanently disbarred.

"The Board of Governors of The Florida Bar concurs with the referee's findings of fact and finds respondent guilty of conduct justifying disciplinary measures but modifies the recommendation of discipline. Therefore it is,

"ORDERED AND ADJUDGED that Ronald E. Kay be found guilty of conduct contrary to good morals and that he be disbarred from the practice of law in Florida. It is further ordered that he pay the cost of these proceedings in the amount of $696.11.

"DONE AND ORDERED this 26th day of May, 1969."

We have carefully considered the oral arguments presented before this Court as well as the briefs and record arising out of this cause. We conclude that there is no reason to disturb the judgment of the Board of Governors, which is hereby confirmed. The respondent Ron-

ald E. Kay is hereby disbarred from the practice of law in this State and the costs of this proceeding in the amount of $696.11 are hereby taxed against him.

It is so ordered.

DREW and CARLTON, JJ., SPECTOR, District Judge, and VANN, Circuit Judge, concur.

ERVIN, C. J., concurs specially.

ERVIN, Chief Justice (specially concurring).

This Court having adopted the view that The Florida Bar has authority to regulate and discipline the morals of members of The Florida Bar (The Florida Bar vs. Hefty, Fla., 213 So.2d 422). I concur in the judgment rendered in this case. My remarks hereinafter are expressed primarily on assumption the Respondent will seek reinstatement inasmuch as The Bar indicates no permanent disbarment is intended, but apparently only an initial condemnation of Respondent's antisocial act.

While Respondent's act definitely affronts public conventions, I am concerned as to the extent of the authority of the Board of Governors of The Florida Bar under controlling concepts of due process to continue the discipline of Respondent since there is no showing in the record of a substantial nexus between his antisocial act, or its notoriety, or place of commission, and a manifest permanent inability on Respondent's part to live up to the professional responsibility and conduct required of an attorney. Compare such cases as People v. Palmer, 61 Ill. 255; In Re Washington, 82 Kan. 829, 109 P. 700; People ex rel. Black

v. Smith, 290 Ill. 241, 124 N.E. 807, 9 A.L.R. 183; State v. Byrkelt, 4 Ohio S. & C.P. Dec. 89; In Re: H____ T_____, 2 Pennyp. (Pa.) 84; Norton v. Macy, 417 F.2d 1161, U. S. Court of Appeals for the District of Columbia Circuit (July 1, 1969); Britt v. Superior Court, 58 Cal.2d 469, 374 P.2d 817. See 7 Am.Jur.2d Attorneys at Law § 45. See the dissenting opinion of Justice Black in Cohen v. Hurley, 366 U.S. 117, at 145-148, 81 S.Ct. 954, 6 L.Ed.2d 574, subsequently adopted in Spevak v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed. 574. See also, United States v. Coplon, 2 Cir., 185 F.2d 629, at page 638, and Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929.

Here, Respondent was not convicted of a felony in a state court, although he was convicted of violating an ordinance in a municipal court. Thus, in the present case, Respondent was not convicted of committing a crime against the state of the class per se deemed indicative of the actor's failure to possess the ability and character necessary to meet the standards of professional responsibility and conduct commensurate with the office of attorney. In reinstatement proceedings, if opposed by The Bar, it would appear necessary for it to show a substantial nexus between the nature or circumstances of Respondent's conduct and his likelihood or tendency to continue to substandardly perform the professional responsibilities of an attorney to the degree that he is deemed totally unfit to resume practice of law.

The present record contains no evidence—scientific, medical, pathological or otherwise—suggesting homosexual behavior among consenting adults is so indicative of character baseness as to warrant a condemnation per se of a

participant's ability ever to live up to and perform other societal duties, including professional duties and responsibilities assigned to members of The Bar. Consequently, the present case leaves this issue unresolved by appropriate findings based on competent evidence.

The circumstances and notoriety of the Respondent's isolated act in its commission, although deemed grave enough to merit initial condemnation and disbarment, does not appear to warrant imposition of permanent disbarment in the absence of a showing of Respondent's permanent unfitness to resume law practice. Here, the homosexual act occurred in a partially partitioned public toilet stall. It was committed only in the known presence of the other participant of the act and, of course, also in the surreptitious presence of the policeman who viewed the act from a point of concealment. Evidence of antisocial behavior ferreted by peeping has never enjoyed widespread legal approval. Compare Britt v. Superior Court, supra.

I acknowledge that circumstances surrounding an act of this sort may be such as to reasonably suggest that a participant's desire for homosexual gratification may exceed his ability to demonstrate a public respect and appreciation of existing societal morals and values. In such instances it possibly may be shown by competent evidence that the participant is so propelled toward deviate sexual behavior that he is incapable of entertaining and manifesting that degree of respect and conscious awareness of public morals and public decency necessary to perform the professional responsibilities required of an attorney. But such permanent unfitness ought to be established by competent substantial evidence in the record of a respondent's case if he is to be denied reinstatement.

Since it is held in Florida that The Bar has jurisdiction to discipline Florida Bar members concerning their personal or private morals, it would appear appropriate to require that such discipline be subject to a showing originally or when reinstatement is sought that there is a substantial connection between a member's antisocial behavior and his ability to otherwise carry out his professional responsibilities as an attorney. Otherwise, The Bar will be virtually unfettered in its power to censor the private morals of Florida Bar members, regardless of any nexus between the behavior and the ability to responsibly perform as an attorney. Governmental regulation in the area of private morality is generally considered anachronistic in the absence of a clear and convincing showing there is a substantial connection between the private acts regulated and public interests and welfare. See cases hereinbefore cited.

The foregoing considered, it appears to me The Bar should be concerned, when and if Respondent applies for reinstatement, with the pathological nature of his behavioral maladjustment and his ability for successful rehabilitation, and whether his problem reasonably militates permanently against his resuming the responsible practice of law.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A.D. 1970

MONDAY, MARCH 30, A.D. 1970

CASE NO. 38,694

THE FLORIDA BAR,

Complainant

-vs-

RONALD E. KAY,

Respondent

On consideration of the Petition for Rehearing filed by Attorneys for Respondent,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:
SID J. WHITE
CLERK SUPREME COURT

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1970

MONDAY, MARCH 30, 1970

CASE NO. 38,694

THE FLORIDA BAR,

Complainant,

vs.

RONALD E. KAY,

Respondent.

Respondent's motion to stay is hereby granted and proceedings in this Court are hereby stayed to and including May 29, 1970, to enable respondent to seek review in the Supreme Court of the United States and obtain any further stay from that court.

A True Copy
TEST:
SID J. WHITE
Sid J. White
Clerk Supreme Court.

cc: Honorable Louis M. Jepeway, Jr.
Honorable Marshall R. Cassedy
Honorable M. Daniel Futch, Jr.

APPENDIX D

RULE 11.02(3)(a) of Article XI of the Integration Rule of The Florida Bar reads as follows:

The standards of professional conduct to be observed by members of the Bar are not limited to the observance of rules and avoidance of prohibitive acts, in the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct to be construed as tolerance thereof. The commission by a lawyer of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline.

Supreme Court, U.S.
FILED
NOV 18 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 209

RONALD E. KAY,

Petitioner,

-vs-

THE FLORIDA BAR,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

Respondent concedes that the opinion of the Florida Supreme Court which resulted in petitioner's disbarment and attached by him as Appendix A and which may be found at the Florida Bar v. Kay, 232 So.2d 378, is as represented in the printed text thereof.

JURISDICTION

For whatever difference it may make in the ultimate disposition of the matter before the Court, respondent concedes

that petitioner's attempt to seek relief from this Court was timely commenced.

That his petition should not result in the relief requested will, for reasons shown hereafter, of course, be argued.

QUESTIONS PRESENTED

The questions presented by petitioner at page 2 of his petition as follows:

"1. Whether the disbarment of an attorney, predicated upon a single, isolated act of homosexuality, entirely unrelated to the practice of law, is a denial of due process of law.

"2. Whether Rule 11.02 (3) (a) of Article XI of the Integration Rule of the Florida Bar is void for vagueness and is impermissibly overbroad in violation of due process of law and unconstitutionally invades the right of privacy.

"3. Whether disbarment of an attorney, predicated upon a single, isolated act of homosexuality, entirely unrelated to the practice of law, is too severe a penalty."

are fairly acceptable and do appear to limn the issues which may be involved.

DISCIPLINARY RULE INVOLVED

Rule 11.02 (3) (a) of Article XI of the Integration Rule of the Florida Bar reads as follows:

"The standards of professional conduct to be observed by members of the Bar are not limited to the observance of rules and avoidance of prohibitive acts, in the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct to be construed as tolerance thereof. The commission by a lawyer of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline."

STATEMENT

So much of petitioner's statement as purports to set out the facts pursuant to which he was arrested, charged under the ordinances of the City of Ft. Lauderdale, and convicted in the municipal court thereof is a reasonably accurate resume except in the following particulars:

(1) when arraigned on the charge in municipal court, petitioner stood mute and the court accordingly entered a plea of not guilty for him;

(2) at no time through the appellate process which followed the municipal conviction did he or anyone on his behalf ever raise as an issue on appeal any question with regard to the sufficiency of the evidence to sustain the charge; and

(3) at the disbarment hearing before the Honorable John W. Douglass, referee, petitioner took the position that engaging in the practice of law was a privilege rather than a right.

STATEMENT OF THE FACTS

On December 1, 1966, between 12:00 noon and 2:15 o'clock P. M., Officer Gerald Wilson, a uniformed police officer of the City of Fort Lauderdale, was observing persons in the public toilet of Stranahan Park in downtown Fort Lauderdale, through an adjustable louvered vent between the toilet and an adjacent utility room which was the hiding place of the officer.

The police officer observed homosexual activities taking place between an adult white male named John Mathew McGrath who was seated on one of the toilets and at least three other adult white and black males waited in turn for their opportunity to place their penis in McGrath's mouth. The police officer testified that petitioner was present in the men's toilet while a third party black adult male,

Marvin West, Jr., was in the act of placing his penis in the mouth of McGrath who was seated on the toilet a few feet from the louvered opening through which the officer was spying. The officer, who had never seen Kay before, testified that Kay was in the toilet when an unknown white male was committing the same act with McGrath; that Marvin West, Jr., entered at this point; that West then received McGrath's favors next and that Kay waited all this time with his penis exposed before he too placed his penis in McGrath's mouth.

The police officer's testimony was corroborated by West.

The officer placed the petitioner Kay, the white male McGrath and the black male West under arrest but was unable to locate the other adult male who had also participated in the activity with McGrath. All were charged in the Municipal Court of the City of Fort Lauderdale with Indecent Exposure in violation of Section 28-25 of the Code of Ordinance of the city.

The negro, Marvin West, Jr., plead not guilty and after trial was found guilty and fined one hundred fifty dollars ($150) plus a mandatory jail sentence of thirty (30) days. McGrath entered a plea of guilty through his attorney and was fined two hundred dollars ($200) plus a thirty (30) day suspended jail sentence.

At the trial of petitioner on May 4, 1967, the white male McGrath was

subpoenaed as a witness for the City of Fort Lauderdale. McGrath invoked the protection of the Fifth Amendment in response to the question, "Mr. McGrath did you take into your mouth Ronald Kay's penis?"

The municipal judge, after hearing all of the evidence, took the case under advisement and rendered a finding of guilty on May 9, 1967. The Judge, Stephen R. Booher, enjoys an excellent reputation of being very deliberate and careful and was particularly careful in this case as evidenced by the fact that the judge actually viewed the scene himself. The attorney for petitioner had contended that it was a physical impossibility for the police officer to have seen what he claimed to have seen, but obviously the judge was satisfied after viewing the area personally.

At the hearing before the referee, counsel for the Bar and for the petitioner stipulated that the transcript of the municipal court of record be introduced in lieu of bringing the live witnesses to the hearing. The only witnesses before the referee were the expert who administered a lie detector test to the petitioner and the petitioner. The expert stated his belief that petitioner was speaking the truth when he denied the charges made against him by the police officer.

At the hearing before the referee, the referee found that petitioner did not testify under oath with candor before the municipal court and also found that there

is serious conflict between his sworn testimony before the municipal court and his sworn testimony before the Grievance Committee in that petitioner testified before the municipal court that he saw nothing out of the ordinary going on in the restroom and he later admitted that he was well aware that homosexual activities were taking place when he first entered the restroom on the day in question in his testimony before the Grievance Committee.

While there are conflicts in the testimony, the referee found that the overwhelming weight of the evidence clearly shows that the petitioner, Ronald E. Kay, while a member of The Florida Bar did, in a public place in the City of Fort Lauderdale, within view of a police officer of the City of Fort Lauderdale, and other adult males, publicly indulge in homosexual activities contrary to good morals.

REASONS FOR DENYING THE WRIT

The Florida Supreme Court's decision below in no way prevented petitioner from practicing law without due process.

Whether we take the position advanced by petitioner before the referee at the disbarment proceeding that the practice of law was but a privilege or the view he now takes that the same is a right, we are satisfied that all thinking persons would agree that due process must be the predicate to the disbarment of any attorney. See Cohen v. Hurley, 366 U.S. 117, 6 L.ed.

2d 156, 81 S.Ct. 955 (1961); Spevack v. Klein, 385 U.S. 511, 17 L.ed.2d 574, 87 S.Ct. 625 (1967); and Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L.ed.2d 796, 77 S.Ct. 752 (1957).

So it is that in this proceeding it ought not to matter how one characterizes the practice of law--the only proper inquiry being whether petitioner was denied due process below.

Initially, we are told under the first division of his complaint that even if everything is as the record below will show it to be, a single act of homosexuality between consenting adults (in this day and time) simply cannot be a sufficient basis for disbarment within the concept of due process.

The particulars of the record below will show no denial of the fact that petitioner's homosexual act occurred in a public restroom within the view of an observing police officer [or anyone else who chose to wander in]. That made his act, unlike that in Britt v. Superior Court, 374 P.2d 817 (1962), very public.

Taking that position to its logical end, petitioner would have to agree that if these same two individuals were to elect to commit the same homosexual act on the lawn of the park outside, it would not matter one whit.

When in the washroom, petitioner knew there were no doors on the commode stalls

and he nevertheless elected to be a willing participant in a criminal act. He thereby entered upon such act with the knowledge that anyone walking in, or then on the scene, could observe the results with relative ease. That it is a criminal act of real magnitude in the State of Florida, one need only turn to Section 800.01, Florida Statutes, in order to divine that one found guilty of the abominable and detestable crime against nature may be sentenced to the state prison for twenty (20) years--automatically a felony. See Section 775.08, Florida Statutes.

Petitioner seems to take comfort from the special concurring opinion of the Chief Justice of the Florida Supreme Court who opined that in this case the Florida Bar was imposing its own personal moral judgment upon the petitioner. He sought to buttress this conclusion by a claim that no nexus had been established as between the admitted moral transgression and the practice of law. Indeed, petitioner strongly urges that to this Court. We hasten to correct any misapprehension on either his or anyone else's part: that was not the opinion of the majority of the court. Indeed, they thought so little of that position that it does not even form a part of the order entered.

We are asked to believe that the Board of Governors of the Bar of the State of Florida have imposed their moral judgment on petitioner. The only honest response to that entreaty is that the <u>people</u> of the State of Florida by and through the

enactment of Section 800.01, supra, made the moral judgment about which petitioner complains.

We would be less than honest if we did not admit that because of this Court's recent decision in the case of Waller v. Florida, ___ U.S. ___, 25 L.ed.2d 435, 90 S.Ct. ___ (1970), there appears no way in which petitioner could be brought to task on the felony charge. We also add that Waller, supra, was not in existence at the time the Florida Supreme Court entered its order disbaring petitioner.

Be the above as it may, as far back as 1883, this very Court, in Ex Parte Wall, 107 U.S. 265, 27 L.ed. 552, 2 S.Ct. 569 (1883), concluded that in no sense was it critical to a disbarment that a "conviction" for a criminal offense be in existence before disbarment could lawfully obtain.

Ex Parte Wall, supra, was a Florida case which had its genesis in Tampa, Florida. Almost immediately after Wall, a local attorney, was found to have fomented and participated in the lynching of a prisoner then held in the Hillsborough County Jail, the matter was brought to the attention of the federal district judge who, after due notice and a hearing, ordered Wall's name struck from the roll of the court. Wall appealed

to this Court and this Court affirmed the action of the district judge in so doing. Wall had never been charged with a crime. Indeed, that was one of his defenses and it formed the touchstone of the dissenting opinion.

Within that decision this Court concluded that there might be many reasons why "a technical conviction" was not required prior to disbarment. Indeed, with a two year statute of limitations in Florida, we wonder at how many times a practicing lawyer, successful in avoiding detection within that interval, could then with impunity brag that he had committed all sorts of non-capital crimes and then defy disbarment! We cannot believe that the only instance in which a disbarment such as that here under consideration could or should be upheld would be one in which a man had been fully and finally convicted of the most vicious of crimes that all would agree brand him a beast. Nor can we agree with petitioner's contention that since this was proved to be only a once happening thing that he was not a proper subject for disbarment as a result thereof. The question redounds: how many times must the commission of a criminal act be proved before disbarment may follow? Need the offender be a multiple rapist or conspirator? Indeed, had petitioner been convicted of the felony proscribed by Section 800.01, supra, a simple certification of the judgment would have been all that was necessary for disbarment rather than the extensive hearing

held by the referee. To accept petitioner's assertion in this area would indeed be to elevate form over substance.

One must wonder at petitioner's rationale in suggesting the absence of any nexus between his criminal act and whether he could continue to perform as an effective lawyer in Florida.

If we can believe the sociologists and penologists of the day, we are told that most of the killings for which people are incarcerated are committed by very ordinary people who follow very ordinary pursuits and not by professional brigands who prey on mankind and threaten to take their lives on the slightest whim. Truly, this Court could almost take judicial knowledge of the fact that far and away the greatest number of murders are committed by people not unlike ourselves.

How do you show a nexus (vis-a-vis the practice of law) between a usually non-violent person who happens to be a lawyer and who, on Christmas morning, kills his wife with the new pistol she just gave him? He certainly is never apt to do it again and in nowise does it keep him from handling uncontested divorces, reading abstracts or filing petitions in bankruptcy by and on behalf of his clients. Indeed, a respected judge who masterminds and is directly responsible for the murder of a

circuit judge and his wife is no doubt still able to tell a voluntary confession from an involuntary one. See Peel v. State, 150 So.2d 281 (1963). The whole point is that if you must show how a societal aberration (criminal act) admittedly committed by a practicing attorney affects the fashion in which he serves the bench and the bar, you might just as well forget about disbarment except when the crime or act is one directly against a client whom he represents or the bar of which he is a member or the judge of the court in which he is appearing. No one among us is foolish enough to think that those instances would number more than half a handful in a lifetime. So it is that under petitioner's position we are left with the proposition that embezzling lawyers will always be disbared if they dip into their client's trust account but murdering lawyers neither can be nor should be. Terminally, we ask: has it really come to that?

Perhaps human activity will one day decree that homosexual behavior between consenting adults, even in public places, is no longer a crime; in which case, proceedings such as this one will be history. Until that day, there ought to be precious little, if indeed any, question but that an individual who happens to be a licensed attorney in Florida may not urge that despite the fact that he was found guilty of having committed acts which were a homosexual crime, he should not be disbarred.